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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JESUS HERALDEZ-MARTINEZ,

12 Petitioner,

13 vs.

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15 FERNANDO A. ARRIOLA, Warden, et al.,

16 Respondents.
17

CASE NO. 11-CV-1004 BEN (JMA)

ORDER:

(1) PARTIALLY TRANSFERRING
CASE TO THE U.S. COURT OF
APPEALS FOR THE NINTH
CIRCUIT AS A PETITION FOR
REVIEW

(2) PARTIALLY DENYING
PETITION

18 Presently before the Court is Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C.
19 § 2241. To the extent that Petitioner challenges the lawfulness of his detention and requests a
20 declaratory judgment that he is a United States citizen, the Petition is **DENIED**. To the extent that
21 Petitioner challenges his past removal orders, this action is **TRANSFERRED** to the Ninth Circuit.

22 **BACKGROUND**

23 Petitioner first came to the United States around 1977. (Return, Exh. B, at 34.) Petitioner's
24 aliases include: Rafael Soto-Majorado, Estevan Herrera Holguin, Jesse Leon Martinez Gonzalez, Jesus
25 Leon Gonzalez, and Alberto Martinez Herrera. (*Id.*, Exh. A, at 11-13.) Petitioner has periodically
26 made claims of U.S. citizenship under these different aliases, and provided false documentation of
27 citizenship. (*Id.*, Exh. B, at 34; Exh. C, at 39; Exh. H, at 69; Exh. P, at 111-12.) Petitioner has also
28 conceded that he was born in Mexico on several occasions. (*Id.*, Exh. B, at 34; Exh. C, at 39.)

Petitioner has been removed from the United States at least ten times. Petitioner has been

1 ordered removed by an Immigration Judge ("IJ") on July 26, 1994; April 10, 1997; October 2, 1998;
2 and April 7, 2005. (*Id.*, Exh. E, at 53; Exh. F, at 59; Exh. H, at 75; Exh. N, at 105.) In addition,
3 Petitioner has been removed by Immigration and Customs Enforcement ("ICE") on August 24, 1977;
4 July 6, 1978; September 9, 1998; December 9, 2003; April 28, 2005; and May 29, 2007. (*Id.*, Exh.
5 C, at 38-44; Exh. D, at 45-50; Exh. G, at 63-66; Exh. K, at 92-96; Exh. O, at 108; Exh. S, at 136-46.)

6 Petitioner has several state and federal felony and misdemeanor convictions. For instance,
7 Petitioner was convicted of second degree robbery in 1977, second degree burglary in 1977, second
8 degree burglary in 1986, possession of a controlled substance in 1988, taking a vehicle without consent
9 in 1989, grand theft in 1992, and possession of a controlled substance in 1995. (*Id.*, Exh. A, at 17-18,
10 20, 26-27, 29-31.)

11 In 2001, Petitioner was found in a county jail in Colorado. (*Id.*, Exh. I, at 80.) Petitioner was
12 charged with unlawfully re-entering the United States subsequent to an aggravated felony conviction
13 in violation of 8 U.S.C. § 1326(a)-(b). (*Id.* at 78-82.) Petitioner was convicted as charged, and
14 sentenced to time served and three years supervised release. (*Id.* at 82-84.) Upon completing his
15 sentence, Petitioner was transferred to ICE custody and removed to Mexico. (*Id.*, Exh. K.)

16 On May 27, 2004, Petitioner, using an alias, applied for admission to the United States and
17 claimed lawful permanent resident status. (*Id.*, Exh. L, at 98.) ICE referred Petitioner for prosecution
18 to the USAO in San Diego, California, after discovering that Petitioner had been previously ordered
19 removed by an IJ. (*Id.*) Petitioner was charged with attempted entry after deportation under 8 U.S.C.
20 § 1326, but was acquitted by jury and released to ICE custody. (*Id.*, Exh. M, at 99-101.) ICE initiated
21 removal proceedings against Petitioner. (*Id.*, Exh. N, at 103-04.) On April 7, 2005, the IJ found
22 Petitioner removable as charged and ordered him removed to Mexico. (*Id.* at 105.) Petitioner was
23 removed to Mexico on the same day. (*Id.* at 106.)

24 On May 6, 2005, Petitioner, using another alias, applied for admission to the United States and
25 declared he was a United States citizen. (*Id.*, Exh. P, at 111-12.) After discovering that Petitioner was
26 a native and citizen of Mexico and had been ordered removed from the United States several times,
27 ICE referred Petitioner for prosecution. (*Id.*) Petitioner was charged with making a false statement
28 to a federal officer in violation of 18 U.S.C. § 1001. (*Id.*, Exh. Q, at 114-16.) On January 5, 2006,

Petitioner was convicted by jury and sentenced to 27 months in custody and three years supervised release. (*Id.* at 115; Exh. R, at 135.) After the completion of his sentence, Petitioner was transferred to ICE custody. (*Id.*, Exh. S, at 137-43.) On May 21, 2007, ICE reinstated Petitioner's April 7, 2005 removal order and removed him to Mexico on May 29, 2007. (*Id.* at 144-46.)

On April 11, 2011, Petitioner was detained by Border Patrol agents near Imperial Beach, California. (*Id.*, Exh. T, at 152.) ICE referred Petitioner for prosecution to the USAO in San Diego, California, after discovering Petitioner's immigration history. (*See id.*, Exhs. T-U.) Petitioner was charged with violating 8 U.S.C. § 1326 and paroled into federal custody at the Metropolitan Correctional Center ("MCC") pending completion of his criminal proceedings. (*Id.*) On May 11, 2011, his criminal proceedings were dismissed. (*Id.*, Exh. T, at 150.) The next day, Petitioner was released from MCC custody and returned to ICE custody pursuant to an immigration detainer. (*Id.*, Klein Decl. ¶ 2.) On May 13, 2011, ICE initiated removal proceedings against Petitioner by issuing a NTA that charged him with removability under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien who has not been admitted or paroled. (*Id.*, Exh. V, at 157-60.) In addition, ICE released Petitioner from custody on his own recognizance on May 13, 2011. (*Id.* at 161; Exh. W, at 164-67.)

Petitioner filed the present Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 on May 6, 2011. (Docket No. 1.) On June 17, 2011, Respondent filed a Return in opposition to the Petition. (Docket No. 7.) Petitioner filed a Traverse on July 18, 2011. (Docket No. 8.)

DISCUSSION

Petitioner (1) challenges the lawfulness of his detention, (2) challenges his past removals from the United States, and (3) requests a declaratory judgment that he is a United States citizen. Each of these issues will be addressed in turn.

I. CHALLENGE TO LAWFULNESS OF DETENTION

Petitioner alleges that his right to due process under the Fifth and Fourteenth Amendment has been violated because "[Petitioner] has been in the custody of the I.N.S. and its successor the Defendant, Bureau of Immigration and Customs Enforcement (ICE) continuously since 2005 by physical custody and/or illegal deportation to Mexico." (Petition at 6.)

Respondents have released Petitioner from custody under an order of release on recognizance.

(Return, Gross Decl. ¶ 4; Exhs. V-W.) Petitioner's challenge to the lawfulness of his detention is moot because there is no effective relief that can be granted. Accordingly, the Court lacks subject matter jurisdiction over the claim because there is no live case or controversy remaining. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548-49 (9th Cir. 1998); *Abdala v. INS*, 488 F.3d 1061, 1064-65 (9th Cir. 2007) (release on an order of supervision is an example of when a habeas petition claiming indefinite detention is moot).

II. CHALLENGE TO PAST REMOVALS FROM THE UNITED STATES

Petitioner alleges that Respondents violated the Petitioner's right to due process of law under the Fifth and Fourteenth Amendments because (1) Petitioner was wrongly removed to Mexico after being acquitted by a jury of illegal re-entry under 8 U.S.C. § 1326 in 2005, and (2) the IJ wrongfully ordered that Petitioner be deported after Petitioner informed the IJ that he was acquitted by a jury of illegal re-entry under 8 U.S.C. § 1326.

Judicial review of removal orders is governed by 8 U.S.C. § 1252, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). Under the REAL ID Act, any challenge to Petitioner's removal order must be directed to the applicable court of appeals:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, . . . *a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section.* For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of Title 28.

8 U.S.C. § 1252(a)(5) (emphasis added). Petitioner, therefore, may not challenge his removal order in this Court. However, the REAL ID Act also requires district courts to transfer all habeas petitions brought by aliens that were pending before the district court on the effective date of the REAL ID Act (May 11, 2005) to the appropriate circuit court. Pub. L. No. 109-13, 119 Stat. 231, § 106(a); *see also Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052-53 (9th Cir. 2005). To the extent that Petitioner challenges his past removal orders, this action is **TRANSFERRED** to the Ninth Circuit.

